

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARDEN CITY BOXING CLUB, INC.,)	
)	NO. CV-04-3078-LRS
Plaintiff,)	
)	
-vs-)	ORDER DENYING MOTION TO
)	DISMISS
NOEMI SOTELO OCAMPO and "JOHN DOE")	
OCAMPO, Individually, and d/b/a)	
Super Mini La More Lense,)	
)	
Defendants/Counterclaimants/)	
Third Party Plaintiffs,)	
)	
-vs-)	
)	
DIRECTV, INC., a foreign)	
corporation doing business in the)	
State of Washington,)	
)	
Third Party Defendant.)	
)	
)	

Pending before the Court is Third Party Defendant DIRECTV's Motion to Dismiss Third Party Claims Pursuant to Fed.R.Civ.P. 12(b)(5) and 12(b)(6), filed June 9, 2005 (Ct. Rec. 18). The motion is without oral argument and has been opposed by the Third Party Defendants.

I. BACKGROUND

On July 9, 2004, plaintiff Garden City Boxing Club, Inc. (plaintiff) filed a complaint against defendants Noemi Sotelo Ocampo and John Doe Ocampo, individually and d/b/a Super Mini La More Lense (collectively

1 "Ocampos") alleging that the defendants illegally and without proper
2 license viewed and displayed a September 14, 2002 boxing match between
3 Oscar De La Hoya and Fernando Vargas. Freeman Decl., ¶ 2.

4 On December 7, 2004, approximately five months after being served
5 with the complaint, and after obtaining leave of court, Ocampos filed an
6 answer to plaintiff's complaint. Ocampos answer included a third party
7 complaint alleging facts and claims against DIRECTV, Inc., the Third
8 Party Defendant. Specifically, Ocampos asserted two claims against
9 DIRECTV: breach of contract and negligence. Id. at ¶¶3-5.

10 Ocampos did not serve the third party complaint on DIRECTV until May
11 2, 2005, 146 days after the filing of the complaint against DIRECTV. A
12 certified mailing was sent to DIRECTV's registered agent, located in
13 Seattle, Washington. Id. at ¶6.

14 II. LEGAL STANDARD

15 DIRECTV moves the Court to dismiss the third party complaint
16 pursuant to Fed. R.Civ.P. 12(b)(5) and (6), for failure to serve the
17 complaint within the time period prescribed by Fed.R.Civ.P. 4(m) and for
18 failure to state a claim upon which relief can be granted.

19 Once a defendant has served a third-party complaint the claim it
20 interposes is to be treated as a separate dispute and the third-party
21 defendant may assert any defenses to it that are available to him. Thus,
22 not only is the third-party plaintiff's claim subject to dismissal
23 directly under Rule 14(a), but it also may be challenged by the impleaded
24 party on one of the grounds set forth in Rule 12 or by a motion for
25 summary judgment.

26 / / /

1 A. Rule 4(m) Legal Standard

2 The Court first examines Rule 12(b)(5) in conjunction with Rule
3 4(m).

4 **Rule 12.** Defenses and Objections--When and How
5 Presented--By Pleading or Motion--Motion for Judgment on
6 Pleadings

7 (b) How Presented. Every defense, in law or fact, to a
8 claim for relief in any pleading, whether a claim,
9 counterclaim, cross-claim, or third-party claim, shall
10 be asserted in the responsive pleading thereto if one is
11 required, except that the following defenses may at the
12 option of the pleader be made by motion: (1) lack of
13 jurisdiction over the subject matter, (2) lack of
14 jurisdiction over the person, (3) improper venue, (4)
15 insufficiency of process, (5) insufficiency of service
16 of process, . . .

17 Fed.R.Civ.P. 12(b)(5).

18 Rule 4(m) of the Federal Rules of Civil Procedure provides:

19 **Rule 4(m).** Time Limit for Service. If service of the
20 summons and complaint is not made upon a defendant
21 within 120 days after the filing of the complaint, the
22 court, upon motion or on its own initiative after notice
23 to the plaintiff, shall dismiss the action without
24 prejudice as to that defendant or direct that service be
25 effected within a specified time; provided that if the
26 plaintiff shows good cause for the failure, the court
shall extend the time for service for an appropriate
period. This subdivision does not apply to service in a
foreign country pursuant to subdivision (f) or (j)(1).

27 Fed.R.Civ.P. 4(m).

28 Rule 4(m) requires a two-step analysis in deciding whether or not
29 to extend the prescribed time period for the service of a complaint. See
30 Fed.R.Civ.P. 4(m); *Petrucelli v. Bohringer & Ratzinger, GMBH*, 46 F.3d
31 1298, 1305 (3d Cir.1995). First, upon a showing of good cause for the
32 defective service, the court must extend the time period. Second, if
33 there is no good cause, the court has the discretion to dismiss without
34 prejudice or to extend the time period. *Id.*

1 The plain language of Rule 4(m) broadens the district court's
2 discretion by allowing it to extend the time for service even when the
3 plaintiff has not shown good cause. See *Espinoza v. United States*, 52
4 F.3d 838, 840-41 (10th Cir.1995). "Relief may be justified, for example,
5 if the applicable statute of limitations would bar the refiled action,
6 or if the defendant is evading service or conceals a defect in attempted
7 service." FED.R.CIV.PROC. 4, 1993 Advisory Committee Notes.

8 The Ninth Circuit has found it "unnecessary ... to articulate a
9 specific test that a court must apply in exercising its discretion under
10 Rule 4(m)," and has "note[d] only that, under the terms of the rule, the
11 court's discretion is broad." *In re Sheehan*, 253 F.3d 507 (9th Cir. 2001).
12 District courts in the Ninth Circuit have exercised their discretion to
13 extend the time for service where defendants "have not suffered any
14 prejudice resulting from the delay" and where the extension will give
15 plaintiffs "an opportunity to litigate the merits of this action, a
16 desirable goal." *Matasareanu v. Williams*, 183 F.R.D. 242, 247
17 (C.D.Cal.1998).

18 B. Rule 12(b)(6) Legal Standard

19 DIRECTV additionally or alternatively moves the Court to dismiss the
20 third party complaint pursuant to Fed.R.Civ.P. 12(b)(6), for failure to
21 state a claim upon which relief can be granted. This rule states in
22 pertinent part:

23 **Rule 12.** Defenses and Objections--When and How
24 Presented--By Pleading or Motion--Motion for Judgment on
Pleadings

25 (b) How Presented. Every defense, in law or fact, to a
26 claim for relief in any pleading, whether a claim,
counterclaim, cross-claim, or third-party claim, shall
be asserted in the responsive pleading thereto if one is
required, except that the following defenses may at the

1 option of the pleader be made by motion: . . . (6)
2 failure to state a claim upon which relief can be
3 granted, . . .

4 If, on a motion asserting the defense numbered (6) to
5 dismiss for failure of the pleading to state a claim
6 upon which relief can be granted, matters outside the
7 pleading are presented to and not excluded by the court,
8 the motion shall be treated as one for summary judgment
9 and disposed of as provided in Rule 56, and all parties
10 shall be given reasonable opportunity to present all
11 material made pertinent to such a motion by Rule 56.

12 Fed.R.Civ.P. 12(b)(6).

13 In ruling on a motion to dismiss pursuant to FRCP 12(b)(6), the
14 Court takes all factual allegations set forth in the complaint as true
15 and views them in the light most favorable to the plaintiff. See, e.g.,
16 *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir.2002).
17 A complaint or claim may not be dismissed for failure to state a claim
18 unless it appears beyond doubt that the plaintiff cannot prove any set
19 of facts in support of the complaint or claim that would entitle him or
20 her to relief. See *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002).
21 The issue is not whether the plaintiff will ultimately prevail, but
22 whether he or she is entitled to offer evidence to support the complaint
23 or claim. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90
24 (1974); see also *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th
25 Cir.1997).

26 In considering "a motion to dismiss, all well-pleaded allegations
of material fact are taken as true and construed in a light most
favorable to the non-moving party." *Wyer Summit P'ship v. Turner*
Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir.1998) (citation omitted).
However, the court does not necessarily assume the truth of legal
conclusions merely because they are cast in the form of factual

1 allegations in plaintiff's complaint. See *Clegg v. Cult Awareness*
2 *Network*, 18 F.3d 752, 754-55 (9th Cir.1994). There is a strong
3 presumption against dismissing an action for failure to state a claim.
4 See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.1997)
5 (citation omitted). " Consequently, the court should not grant a motion
6 to dismiss "for failure to state a claim unless it appears beyond doubt
7 that the plaintiff can prove no set of facts in support of his claim
8 which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46,
9 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); see also *Hicks v. Small*, 69 F.3d 967,
10 969 (9th Cir.1995).

11 III. DISCUSSION

12 A. DIRECTV'S POSITION IN SUPPORT OF RULE 12(b)(5) DISMISSAL

13 DIRECTV presents the following arguments as to why this Court should
14 exercise its discretion under Rule 4(m) and dismiss the claims against
15 it. DIRECTV complains that during the time between Ocampos' filing of
16 the Third Party Complaint and the service upon DIRECTV, several
17 significant dates/deadlines expired. Ct. Rec. 19, at 3. Specifically,
18 the Court held a telephonic scheduling conference with the named parties
19 on March 4, 2005. As DIRECTV had not yet been served, it states it was
20 not afforded an opportunity to participate in the scheduling conference.
21 Secondly, and pursuant to the scheduling conference, Fed.R.Civ.P. 26(a)
22 Initial Disclosures were to be served among the parties by April 29, 2005
23 which was before DIRECTV was served with the third party complaint on May
24 2, 2005. DIRECTV, therefore, was unable to comply with the Court's
25 scheduling order. Id. DIRECTV complains that it was not served with any
26 other party's initial disclosures. Id. DIRECTV concludes that Ocampos

1 failure to serve it within the 120 days was based on lack of diligence.
2 Id. at 7. DIRECTV additionally comments that the statute of limitations
3 does not appear to be an issue with Ocampos' claims.

4 Ocampos, in opposing the motion, argue that any delay in this
5 litigation flows from their desire and good faith attempts to settle this
6 matter without further litigation. Ct. Rec. 26, at 2. In fact, Ocampos
7 state, a settlement has been reached and all that remains of this case
8 is the review of proposed settlement documents.

9 B. DIRECTV'S POSITION IN SUPPORT OF RULE 12(b)(6) DISMISSAL

10 DIRECTV makes a further attempt to have the claims against them
11 dismissed pursuant to Rule 12(b)(6). DIRECTV argues in the alternative
12 that Ocampos' claims against it for breach of contract and negligence
13 should each be dismissed pursuant to Rule 12(b)(6) for failure to state
14 a claim upon which relief may be granted.

15 DIRECTV states that "the Ocampos can show no set of facts to support
16 their claims (1) DIRECTV was contractually obligated to advise the
17 Ocampos that they needed a 'business contract' instead of a 'consumer
18 contract,' and (2) DIRECTV breached any such obligation." Ct. Rec. 19,
19 at 9. Similarly, DIRECTV argues that "Ocampos' claim for negligence
20 should be dismissed because (1) the Ocampos can show no set of facts to
21 support their claim that DIRECTV owed the Ocampos a duty to prevent the
22 Ocampos from being involved in litigation; and (2) the Ocampos can show
23 no set of facts to support their claim that DIRECTV breached any such
24 duty. Id. at 10.

25 Ocampos argue in opposition that the third party complaint, which
26 sounds in tort and contract, clearly provides sufficient basis for a

1 claim. Ct. Rec. 26, at 3. Further, the law is clear that dismissal is
2 proper on Rule 12(b)(6) grounds only when no set of facts could support
3 a claim. Id.

4 C. OCAMPOS HAVE SHOWN GOOD CAUSE

5 The Advisory Committee Notes to the 1993 Amendments to Rule 4(m)
6 highlight the significant difference between Rule 4(m), as amended, and
7 its predecessor, Rule 4(j):

8 The new subdivision explicitly provides that the court
9 shall allow additional time if there is good cause for
10 the plaintiff's failure to effect service in the
11 prescribed 120 days, and authorizes the court to relieve
12 a plaintiff of the consequences of an application of
13 this subdivision even if there is no good cause shown.
Such relief formerly was afforded in some cases, partly
in reliance on Rule 6(b). Relief may be justified, for
example, if the applicable statute of limitations would
bar the refiled action, or if the defendant is evading
service or conceals a defect in attempted service.

14 There is limited appellate authority interpreting Rule 4(m);
15 however, the authority that does exist does not support DIRECTV's
16 position. As stated by the Third Circuit Court of Appeals in a
17 well-reasoned and thorough discussion of Rule 4(m): "We read the new rule
18 to require a court to extend time if good cause is shown and to allow a
19 court discretion to dismiss or extend time absent a showing of good
20 cause." *Petrucelli v. Bohringer and Ratzinger, GMBH Ausdereitungsanlagen*,
21 46 F.3d 1298, 1305 (3d Cir.1995) (emphasis added); see also *Espinoza v.*
22 *United States*, 52 F.3d 838, 840 (10th Cir.1995) ("The plain language of
23 Rule 4(m) ... broadens the district court's discretion by allowing it to
24 extend the time for service even when the plaintiff has not shown good
25 cause."). In explaining its rationale, the Third Circuit noted:

26 [W]e find that the plain language of the rule itself
explains that in all cases, the court has the option of

1 dismissing the action or extending time for service. The
2 fact that the word 'shall' is used along with the
3 disjunctive 'or' in the first clause indicates that the
4 court has discretion to choose one of these options. As
5 an exception to this general provision, the second
6 clause notes that if good cause exists, the district
7 court has no choice but to extend time for service.
8 Thus, the logical inference that can be drawn from these
9 two clauses is that the district court may, in its
10 discretion, extend time even absent a finding of good
11 cause.

12 *Petrucelli*, 46 F.3d at 1305.

13 The Third Circuit then proposed the following procedure when
14 determining whether to extend time beyond 120 days for service of
15 process:

16 First, the district court should determine whether good
17 cause exists for an extension of time. If good cause is
18 present, the district court must extend time for service
19 and the inquiry is ended. If, however, good cause does
20 not exist, then the court may in its discretion decide
21 whether to dismiss the case without prejudice or extend
22 time for service.

23 *Petrucelli*, 46 F.3d at 1305; *See also Espinoza*, 52 F.3d at 841.

24 Initially, the Court considers whether Ocampos have established good
25 cause for their failure to serve DIRECTV within 120 days of filing the
26 complaint. DIRECTV was served within 146 days. The Ninth Circuit has
27 characterized good cause, at a minimum, as "excusable neglect."
28 *Electrical Specialty Co. v. Road Ranch Supply, Inc.*, 967 F.2d 309, 312
29 (9th Cir.1992); *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir.1991).¹
30 The good cause exception applies only in limited circumstances, and
31 inadvertent error or ignorance of governing rules alone will not excuse

32 ¹The Court recognizes that these cases were decided prior to the
33 1993 Amendments to Rule 4. These cases, however, provide some guidance
34 nevertheless.

1 the failure to serve. *Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th
2 Cir.1992).

3 The Court finds that Ocampos' failure to timely serve can be
4 characterized as good cause. Ocampos stated, and the Court recalls, that
5 an extension to the scheduling conference was requested by Ocampos'
6 counsel based on continuing good faith efforts to settle the matter
7 without further litigation. Ct. Rec. 10. Ocampos indicate that they
8 have been in active settlement negotiations with plaintiff up until or
9 about June 17, 2005, at which time the matter was deemed settled. Ct.
10 Rec. 26, at 2. Ocampos report that currently they are reviewing proposed
11 settlement documents. Thus, all delays flow from Ocampos' desire and
12 attempts to settle this matter without further litigation. Id.

13 The Court finds that DIRECTV has not demonstrated that it will
14 suffer prejudice if the time for service is extended in this case. For
15 instance, the Court could very well vacate the dates previously set in
16 the scheduling order if DIRECTV or any other party requests or stipulates
17 to do so. The Court was informed in this case that the parties were
18 working towards a settlement of the matter. Moreover, adequate time
19 remains before the current discovery cut-off date (November 28, 2005) and
20 the deadline to add new parties (November 14, 2005); thus, DIRECTV will
21 have ample opportunity to prepare its defense for trial. Given the fact
22 that DIRECTV will have adequate time to mount a defense, the court
23 concludes that it is preferable to resolve Ocampos' claims against them
24 on the merits, should this matter not be resolved through the tentative
25 settlement reported by Ocampos. The Court, therefore, denies DIRECTV's
26 ///

1 motion to dismiss on grounds of failure to timely serve the summons and
2 complaint.

3 As to the argument for dismissal based on a failure to state a claim
4 upon which relief may be granted, the Court finds DIRECTV's argument
5 premature in light of its position that it has been unfairly
6 disadvantaged by not having the opportunity to receive and review initial
7 disclosures and any discovery in this case. (Ct. Rec. 19, at 7-8).

8 Accordingly,

9 **IT IS ORDERED:**

10 1. Third Party Defendant DIRECTV's Motion to Dismiss Third Party
11 Claims Pursuant to Fed.R.Civ.P. 12(b)(5) and 12(b)(6), filed June 9,
12 2005, Ct. Rec. 18, is **DENIED**.

13 2. To the extent not completed, Rule 26(a)(1) disclosures shall be
14 made by all parties on or before **August 26, 2005**.

15 The District Court Executive is directed to file this Order and
16 provide copies to counsel.

17 **DATED** this 8th day of August, 2005.

18 *s/Lonny R. Suko*

19 _____
20 LONNY R. SUKO
21 UNITED STATES DISTRICT JUDGE
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